Count One charges that petitioner *"represented himself to officers of Michigan Chrome as a labor relations advisor"*.

Count Two, adopting by reference all of the allegations of Count One, likewise charges that petitioner *represented himself* to Michigan Chrome, the employer, *as a labor relations advisor*. We pause to inquire as to why, if *he was a representative of the employer,* as defined in the Act, it became necessary for him to *represent that he was such employers labor relations advisor?*

Be that as it may, Congress in no unmistakable terms, and in language so clear and plain "that all who run may read", thus defined petitioner's alleged position:

> (m) "Labor relations consultant" means any person who, for compensation, advises or represents an employer, employer organization or labor organization concerning employee organizing, concerted activities, or collective bargaining activities."

The Indictment contrary to the definition Congress sets forth in the Act is otherwise described as follows: viz: that he *"represented himself to officers of Michigan Chrome as a labor relations advisor"*, despite the statutory definition as aforesaid. Under the Act, in order to be guilty of the substantive offense, he must perforce have been *the* representative of the employer, Michigan Chrome, and its agent or employee, and *not one who represented or pretended that he was such representative.*

In *27 Am. Jur.*, p. 656, Section 99, it is said:

> "As a general rule, an indictment or information charging an offense denounced and defined by statute should be as fully descriptive of the offense as in the language of the statute, and should allege

> every substantial element of the offense defined by the statute, without material diversion or departure from the fair intendment of the terms of the statute and with reasonable particularity of time, place and circumstances. * * *"

Citing *inter alia: Potter v. United States,* 155 U.S. 438, 39 L.ed. 214; *United States v. The Neurea,* 15 L.ed. 531:

> "* * * it is now well settled that except as to treason there are no common law offenses against the United States". 14 Am. Jur., p. 766, Sec. 15, citing *inter alia: Donnelley v. United States,* 4 L.ed. 426 and *United States v. Gradwell,* 243 U.S. 476, 61 L.ed. 857.
>
> "There are some offenses which are so defined by statute that they may be committed only by certain persons or classes of persons. * * *" 14 Am. Jur., p. 819, Sec. 73.

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Realizing that the petitioner must be one of that class of persons defined in the Act as being capable of committing the offense denounced by the statute, counsel for the Government cite and rely upon, *United States v. Ryan,* 350 U.S. 299, 302. In that case, however, beyond any question of a doubt, the president of a union, who was also its principal negotiator, and who was described as such in the indictment, was one of the class of persons described in Section 186 (a). It was charged that in such capacity he received moneys or other things of value, from the employer. *He was not charged with representing himself to be such president and principal negotiator.*

In *United States v. Donovan* (1964), (C. A. 7th), 33 Fed. 2nd, 404, 407, where a violation of Title 29 U.S.C.A., Section 186(b), which pertains to persons to whom moneys

are paid by employers, labor advisors, etc., the Court held as follows:

> "It is an elementary principle of criminal pleading that where the definition of an offense employs generic terms it is not sufficient to charge the offense in such generic terms but the indictment must state the species—it must descend to particulars. *Russell v. United States,* 369 U.S., 749, 765, 8 L.ed. 2nd 240. The basis upon which this principle rests —the necessity that the indictment inform the accused with reasonable certainty of the specific offense with which he is charged—is, in, our opinion equally applicable where the statute, as it here does, proscribes different types of conditions in the disjunctive. * * *"

Count One of the indictment charges that petitioner, who *represented himself* to officers of Michigan Chrome *as a labor relations advisor,* entered into a conspiracy with Louis T. Ralston, *whom the Indictment charges, was the Secretary-Treasurer and Business Representative of Local 233,* to violate Section 186 of Title 29, United States Code.

Count Two of the Indictment charges that *Weinhart, who represented himself to be a labor relations advisor* and Ralston, whom the Government charges with not representing himself to be, but who actually was the Secretary-Treasurer and Business Representative of Local 233, did unlawfully, wilfully and knowingly request the payment of an unspecified sum of money from officials of Michigan Chrome in violations of Section 186 (b) of Title 29, and Section 2 (a) of Title 18, United States Code.

Thus, petitioner is not charged under Section 186 (a) with conspiring to pay, lend, or deliver, or agreeing to

pay, lend, or deliver, any money or other thing of value to any labor organization (the only offense the act denounces *which one who is a labor relations expert* as defined in said Act, *or even as one who* in the language of the Indictment *represented himself to be a labor relations advisor* could commit) but with an alleged offense nowhere to be found within the "four corners" of Section 186 of Title 29 United States Code.

To have been guilty of a violation of Section 186 it became necessary for the Government to charge and prove:

(a) That petitioner was in fact and in law (as defined in the Act) a Labor Relations advisor *and not that he represented himself to be a Labor Relations advisor;* and

(b) That he, as an actual Labor Relations advisor, and not as a pretender to that office, did pay, agree to pay, lend, or deliver, any money or other thing of value—

> (1) "to any labor organization, * * *, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are engaged in an industry affecting commerce; or
>
> (2) "to any employee or group or committee of employees of such employer in excess of their normal compensation for the purpose of causing such employee or group or committee to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or
>
> (3) "to any officer or employee of a labor organization * * * with intent to influence him in respect to any of his actions, decisions or duties as a representative of such labor organization."

The sole purpose of the Act is to guarantee to all who toil for an employer engaged in an industry affecting commerce, the right to organize, bargain collectively, etc., by prohibiting the illegal payment of money and/or in the demanding of moneys, etc. by the person or persons described in the Act to payees who are likewise described and defined in said Act.

With none of the acts condemned, does the indictment charge petitioner and the overt acts charged are not concerned with the payment of moneys, etc., but with the making of telephone calls, of meetings in a restaurant, and sending a telegram.

The Indictment is fatally defective in that:

(a) it does not charge the offense described in the Act; and

(b) *it does not charge that petitioner* as defined in the Act as one of the persons having the capacity to commit the offense defined *was in fact and in truth a Labor Relations advisor—it merely charges that he so represented himself to be.*

Count Two of the Indictment charges petitioner with violating Section 186 (b) of Title 29, United States Code, which provides as follows:

"(b) It shall be unlawful for any person to request, demand, receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a)".

The Indictment is further fatally defective in that:

(a) Count Two attempted to fix petitioners status as being a Labor Relations advisor—it merely avers that he represented himself to be a Labor Relations advisor;

> (b) Section 186 (b) was enacted by Congress to bring within the scope of the Act, persons not of the class set forth in Section 186 (a) and as defined in the Act. It was aimed at including within its condemnatory language persons other than "employers * * * persons who act as a labor relations expert, adviser or consultant to an employer * * *".

Count Two might perchance charge a violation of a state statute, condemning extortion, bribery, receiving money under false pretenses, etc., but it charges no offense denounced by the Act of Congress with which we are here concerned.

It has been held that:

> "* * * Where a particular class is spoken of and general words follow, the class first mentioned is to be taken as the most comprehensive and the general rules treated as referring to matters *ejusdem generis* with such class.
>
> The specific words of the statute are 'if any judge or clerk of any election authorized by law or any other persons' must be construed to mean other persons legally connected with such election, as officers or otherwise. * * *"

The indictment which charged the defendant and several other persons with violating a penal election statute did not describe them as coming within the class of persons at whom the statute was directed, viz: any judge or clerk of any election.

The Court's opinion was concluded as follows:

> "Our conclusion is that the indictment is fatally defective, in that it does not set forth with particularity the acts which defendant is attempted to be charged as being criminal under the statute,

and does not inform him of their character so as to enable him to prepare his defense. The judgment is reversed, and defendant discharged."

State v. Kreuger (1896), 35 S.W., 604-605-606 (134 Mo. 263).

In *United States v. Florida East Coast Ry. Co.*, CCA Fla. 22 F. 33, 36, the Court held that under the doctrine of *ejusdem generis, a train conductor is not included within the proviso of Section 2, 45 U.S.C.A., Sec. 62, relating to hours of service of operators, train dispatchers, or other employees who use the telegraph or telephone to dispatch, receive or deliver orders pertaining to train movements:*

"Where an act passed by the legislature embodies a definition, it is binding on the courts." (*Collins v. Texas,* 223 U.S. 288, 56 L.ed., 439) 50 Am. Jur. "Statutes", Section 262.

In the Indictment under which petitioner was convicted, he was charged with two separate and distinct offenses, viz: that of having conspired to violate Section 186 (a), although the wrongful acts set forth and defined in the Act are not at all mentioned in Count One and under Count Two with having unlawfully requested sums of money, etc., from Michigan Chrome. In other words, the position forced upon him was that like a person who attempts to be both "buyer and seller" in the one and same transaction. Conceding arguendo that Count Two charges that he, as one who was not a Labor Relations Expert in the words of the Act, but one who so represented himself to be, violated Section 186 (a), then *he is charged with paying, delivering, money or other things of value to an employer engaged in an industry affecting commerce.*

Under Count Two, it is charged that petitioner, described and defined in Count One as representing himself

to be a Labor Relations Advisor, that he did unlawfully, etc., request payment of an unspecified sum of money from officials of Michigan Chrome in violation of Section 186 (b) of Title 29, U.S.C.A.

In other words, he is charged in the two count indictment with being a payor as well as a payee,—as a consignor as well as being at the one and the same time a receiver. He is further charged with being, or at least representing himself to be an employee—Labor advisor of Michigan Chrome, and under Count Two, that he did unlawfully, etc., request payments of money from his own employer—Michigan Chrome,—in violation of Section 186 (b), which refers back to and includes the offense denounced by Section 186 (a) as stated in said Section 186 (b).

Assuming that petitioner had been charged in the language of Section 186 (a), the illegal act was in performing a service for his employer, Michigan Chrome, whereas under Count Two he is charged (considering the statute) with unlawfully, etc. requesting money from his said employer (assuming that Michigan Chrome was such) in violating subsection (a): That violation as a Labor Relations Advisor could only consist in paying moneys, etc. to a representative of the employees, to any labor organization, officer, etc., to any employee or group or committee of employees "for the purpose of causing such employees * * *, directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing", or "to any officer of a labor organization * * * to influence him in respect to any of his actions * * * as a representative of such labor organization" and not to his employer.

Thus it was attempted under Count One to charge that petitioner conspired to violate (a substantive act) an act

of benefit to his employer, Michigan Chrome, *and that under Count Two he demanded moneys from his said employer which obviously could not be of benefit to his employer.* The Act does not seek in the least to protect an employer but to protect labor organizations, employees who might wish to organize and to safeguard their right to bargain collectively through representatives of their own choosing.

Count One does not charge the commission of the substantive offense. It alleges a conspiracy to do certain acts not at all set forth in the Act. Count Two makes an abortive attempt to allege that by extorting or attemping to extort moneys from his employer (a state offense), petitioner as one alleging himself to others to be the employer's Labor Advisor, did so for the purpose as stated in Section 186 (a) of corrupting labor organizations, employees, etc. in his employer's behalf,—by extortion.

In the petition filed herein it is pointed out at p. 5, that counsel for the Government, in his closing argument commented upon the failure of defendant (Petitioner) to take the stand as a witness, so as to testify in his own behalf.

In *Griffin v. California* (1965), 88 S.C. 1229, this Court has said:

> (Syllabi) "Fifth Amendment in its direct application to federal government and its bearing on States forbids either comment by prosecution on accused's silence or instructions by the court, that silence is evidence of guilt. * * *
>
> Trial Judges and prosecutor's comment on defendant's failure to testify in California criminal case violates self incrimination clause of fifth amendment. * * *"

CONCLUSION

For the foregoing reasons, it is respectfully urged that this petition be granted, and that, upon further consideration, the Judgment of the United States Supreme Court be reversed.

CERTIFICATE OF COUNSEL

I, Earl T. Prosser, counsel for the above named petitioner, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

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